NO. 50340-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

PEDRO TOMAS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Andrew J. Toynbee, Judge

BRIEF OF APPELLANT

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RULES, STATUTES, AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The police illegally detained Tomas.

2. The police failed to prove that Tomas intentionally assaulted an officer.

3. The state failed to prove that the officer was harmed or offended by the contact with Tomas.

Issues Presented on Appeal

1. Did the police violate Tomas' state and constitutional rights to privacy and to be free from unreasonable detention, search and seizure when they handcuffed him based on an anonymous caller describing a Hispanic man in the street wearing specific clothing, waiving a knife at no one in particular, but where the state failed to present any evidence that Tomas met the caller's description or that he had committed a crime?

2. Did the state fail to prove that Tomas intentionally assaulted an officer?

3. Did the state fail to prove that the strike against the officer was offensive or harmful when the officer did not testify to being harmed or offended?

B. STATEMENT OF THE CASE

Pablo Lopez Thomas was charged by amended information with assault in the third degree. CP 5-8; RP 3. He was convicted as charged by a trial to the bench. RP 5; CP 9, 26-35. The court entered challenged findings and conclusions following the bench trial. CP 12-18; RP 55-63. This timely appeal follows. CP 36.

Someone called 911 informing the police that a Hispanic man was waiving a butcher knife in the middle of the street and was wearing jeans and a hat on backwards. RP 9-10. The caller believed that the man went into a red brick house. RP 11. Centralia police patrol officer Mike Smerer drove to the location described but did not see anyone outside. RP 11. Another officer noticed the door open to a red brick house, knocked and let himself in when no one answered. RP 11. Thomas soon exited the house sweating, shaking, and in Smerer's opinion appearing "very odd". RP 12. There was no description of Tomas' ethnicity or clothing.

Smerer noted that Tomas did not make eye contact. RP 12. Smerer did not know if a burglary or assault had occurred. Id. Smerer asked Tomas if he lived at the address, to which Tomas indicated, he did not but that he knew the residents. Id. Smerer

placed Tomas in handcuffs, but informed the court that Tomas was not under arrest at this time. RP 12-14. Smerer did not know if Tomas understood English, but believed that Tomas was under the influence. RP 13. Smerer used his hands to communicate to Tomas to sit down. RP 23-24.

Smerer indicated that he handcuffed Tomas because he did not know what was going on and Smerer wanted to investigate further. RP 13-15. Smerer repeatedly told Tomas to sit outside in the yard. Thomas repeatedly stood up and sat down. RP 14-15. According to Smerer, Tomas did a “squat thrust” from both knees to one knee resulting in Tomas hitting his head into Smerer’s chest. Smerer’s foot moved a little but Smerer knocked Tomas to the ground. RP 15.

Smerer hit Tomas with such force that Tomas fell and, hit his head on the ground forcefully. Tomas’s eyelids trembled, and Tomas began screaming, causing petechial-hemorrhaging in his eyes. Tomas’ vessels looked like they burst, and his muscles were tense. RP 17. After hitting his head from the fall, Tomas began bashing his head against the concrete. RP 18. Smerer, concerned for Tomas’ safety, called for a medic who took Tomas to the

hospital. RP 18-19.

Smerer testified that he did not smell any odor of intoxicants but believed that Tomas could have been under the influence of something at 7:30 in the morning. RP 21-22. Tomas remained in the hospital for some days after this incident due to the high levels of alcohol in his system. RP 24-25, 37. Five months later, officer Alan Hitchcock arrested Tomas for assaulting Smerer. RP 25-26. After Tomas was arrested, he asked why he was under arrest. RP 31. According to Hitchcock after he explained the reason for the arrest was the assault on the police officer, Tomas, responded that he remembered the incident and that he was drunk at the time of the incident, and when he's intoxicated he does stupid things, and he has since stopped drinking'. RP 34. Tomas also apologized many times. RP 35.

Tomas remembered being drunk the night before the morning of the police contact, but did not remember anything about the next day or having contact with the police. RP 37-38. Tomas' first memory came when he woke in the hospital several days later and was told that his system was full of alcohol. RP 37. Tomas had no idea how much alcohol he had consumed. RP 38-39.

Defense counsel did not call an expert to testify regarding Tomas' level of intoxication but argued in closing that Tomas could not form the intent to assault and the state did not prove that the contact was harmful or offensive to the officer. RP 44. The court agreed that the state did not prove that the contact was offensive but held that the state proved its case by implication and that the assault was intentional because the court believed that Tomas' level of intoxication did not prevent him from forming intent. RP 48-49. The defense objected to the court's findings and conclusions indicating that Tomas intentionally struck Smerer. RP 57-63.

The court stayed the sentence pending appeal and imposed legal financial obligations after determining that Tomas could work. RP 68-76. The court also imposed repeat review hearings to be scheduled at six month intervals. RP 77-78.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE ALL OF THE ESSENTIAL ELEMENTS OF ASSAULT OF AN OFFICER IN THE THIRD DEGREE.

The state failed to prove that Tomas intentionally assaulted an officer. To prove assault against an officer under RCW

9A.36.031(g), the state had to prove that Tomas intentionally assaulted a law enforcement officer who was performing his official duties at the time of the assault. Id.

a. Standard of Review.

In every criminal prosecution, due process requires that the state prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Houston-Sconiers*, 188 Wn.2d 1, 15, 391 P.3d 409 (2017) (*citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). All reasonable inferences from the evidence are drawn in favor of the state and interpreted "most strongly" against the defendant. *Houston-Sconiers*, 188 Wn.2d at 15; *Salinas*, 119 Wn.2d at 201.

"Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court "defer[s] to the trier of fact on issues of

conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (Smith II).

"[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd,* 174 Wn.2d 909, 281 P.3d 305 (2012) (*citing State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)); see also RAP 2.5(a)(2) (stating "a party may raise the following claimed errors for the first time in the appellate court ... failure to establish facts upon which relief can be granted. . . ."). "A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is 'manifest.'" Id.

b. Assault in the Third Degree.

In Washington, a person is guilty of third degree assault if he "[a]ssaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." RCW 9A.36.031(1)(g). Assault is defined not by statute but by common law and covers three types of conduct: "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

c. No Evidence Intent to Assault.

In Washington, assault is a specific intent crime. *State v. Williams*, 159 Wn. App. 298, 307, 244 P.3d 1018 (2011) *review denied,* 171 Wn.2d 1025 (2011) (*citing, State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). In other words, a defendant must act with specific intent to commit an actual battery or to put his victim in apprehension of harm. *Williams,* 159 Wn. App. at 307.

To prove Tomas committed assault against an officer, the state was required to prove Tomas intended to commit an assault.

Id. During the incident, Tomas was sweating profusely, shaking and acting odd, he was unable to follow the simple command to sit, and he had toxic levels of alcohol in his system when he encountered Officer Smerer RP 10, 12, 37.

(i) Voluntary Intoxication.

Tomas' level of intoxication prevented him from forming the intent to commit an assault. Diminished capacity from intoxication is not a true "defense", but rather "[e]vidence of intoxication may bear upon whether the defendant acted with the requisite mental state". *State v. Coates*, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987). (citing WPIC 18.10).

Washington recognizes an intoxication defense. RCW 9A.16.090. The statute recognizes that whenever a crime has a "particular mental state," voluntary intoxication "may be taken into consideration in determining such mental state." Id.

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. *State v. Everybodytalksabout*, 145 Wn.2d 456,

479, 39 P.3d 294 (2002); *State v. Kruger*, 116 Wn. App. 685, 691-92, 67 P.3d 1147 (2003).

In other words, the evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996) (physical manifestations of intoxication provides sufficient evidence from which to infer that mental processing also was affected, thus entitling the defendant to an intoxication instruction). Gabryschak was entitled to instruction where he did not respond to pain and had to be hit by stun gun twice to respond to police commands. Also, in *State v. Rice*, 102 Wn.2d 120, 122-23, 683 P.2d 199 (1984), two defendants were entitled to intoxication instructions where one was so drunk that he spilled beer and was uncoordinated while playing ping pong. The second defendant was also entitled to instruction because he was too drunk to feel pain when hit by a car. Id.

Here, Tomas's defense counsel presented sufficient evidence of diminished capacity - voluntary intoxication defense to preclude the state from proving intent to assault beyond a

reasonable doubt. RP 35, 37, 44-46. Tomas had no memory of the incident, he was highly intoxicated during the incident, and hospitalized for days due to the excessive level of alcohol in his system. RP 37. If Tomas had no memory of the entire day when the incident occurred, could only remember being drunk the night before the incident, and had no memory of the day in question, there was no evidence direct, circumstantial or inferentially to support the element of intent beyond a reasonable doubt. For this reason, the charge should be reversed and dismissed for insufficient evidence and the matter remanded for dismissal.

d. Lack of Evidence of Harm or Offensive Contact.

To prove a battery type assault as charged in this case, the state was required to prove beyond a reasonable doubt that the officer felt that the contact from Tomas was harmful or offensive. *State v. Cardenas-Flores*, ___ Wn.2d ___, 401 P.3d 19, 31 (2017); S*tate v. Hall*, 104 Wn. App. 56, 64, 14 P.3d 884 (2000).

Here, Officer Smerer did not indicate that the contact from Tomas was offensive. Rather, Smerer testified that "[h]e threw his body up towards me with his head leading and went right into my

upper chest with his head. That's when I smacked his head away from me and when he fell to the ground." RP 15. Smerer testified that the contact was only "[e]nough to, I mean, at least move my foot backwards. I mean, it wasn't enough to knock me over." RP 16. The prosecutor did not ask Smerer if the contact was harmful, and Smerer's testimony established that the contact was not harmful to him. Id

The prosecutor also failed to ask Smerer if the contact was offensive, and the testimony does not support this inference. Smerer indicated that he was "quite taller than the defendant" and Smerer did not indicate any offense or concern for his own safety, but rather was concerned with Tomas' safety after Tomas' struck his head hard on the ground. RP 16-18.

The evidence is insufficient establish assault in the third degree as charged when viewing the evidence in the light most favorable to the state. Accordingly, this Court must reverse the charge and remand for dismissal with prejudice.

2. THE POLICE VIOLATED OF TOMAS' PRIVACY RIGHTS BY DETAINING HIM WITHOUT REASONABLE ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY.

Tomas challenged the trial court's finding and conclusions of law following the bench trial that Tomas acted intentionally when his head struck Smerer's, but did not object to the initial detention. RP 55-63.

This Court reviews conclusions of law from an order pertaining to the suppression of evidence de novo. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). This Court reviews findings of fact entered following a motion to suppress for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings are considered verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

The Fourth Amendment to the United States Constitution protects against unlawful searches and seizures. Art. I, § 7 of the Washington Constitution protects against unwarranted government intrusions into private affairs. Art. I, § 7 provides greater protection than guaranteed by the Fourth Amendment. *State v. Parker*, 139 Wn.2d 486, 493-94, 987 P.2d 73 (1999).

As a general rule, under the Fourth Amendment and art. I, § 7, warrantless searches and seizures are per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010); *State v. Gatewood,* 163 Wn.2d 534, 539, 182 P.3d 426 (2008); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). A person is seized when he is handcuffed. *Gatewood*, 163 Wn.2d at 540 (police saying, "'Stop I need to talk to you,'" is a seizure).

The rule against warrantless seizures is subject to a few "jealously and carefully drawn exceptions." *Gatewood*, 163 Wn.2d at 539; *Coolidge*, 403 U.S. at 455. The burden is on the state to prove that an exception to the warrant requirement applies. *State v. Hendrickson,* 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

One such exception is a *Terry*[1] stop. *Ladson,* 138 Wn.2d at 349. A *Terry* stop permits an officer to briefly detain and question a person reasonably suspected of criminal activity. *Garvin*, 166 Wn.2d at 250; *State v. Smith*, 102 Wn.2d 449, 452, 688 P.2d 146 (1984) (Smith I). To justify a *Terry* stop, "the police officer must be able to point to specific and articulable facts which, taken together

1 *Terry v. Ohio*, 392 U.S. 1, 88, S.Ct. 1868, 20 L.Ed.2d 889 (1968).

with the rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *See also*, *Gatewood*, 163 Wn.2d at 539 (the officer must have "'a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a *crime*.'". In reviewing the merits of an investigatory stop, courts evaluate the totality of the circumstances available to the investigating officer. *State v. Glover,* 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

The suspicion of criminality must be focused specifically on the individual seized, and not on the area in which the individual is found. *Smith*, 102 Wn.2d at 452-53; *Ybarra v. Illinois*, 444 U.S. 85, 90-91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). Presence in an area suspected of criminal activity, or a vague description of a suspect do not, on their own, justify a *Terry* stop. *Doughty*, 170 Wn.2d at 62. A person's race is also an insufficient basis to stop and detain a person. *United States v. Lopez*, 482 F.3d 1067, 1069-70 (9th Cir, 2007).

For example, in *Lopez,* officers were searching for a man who had allegedly attempted to shoot police officers. *Lopez*, 482 F.3d at 1069-70. The suspect was described as an adult Hispanic

male in his 20s with a thin build, taller, wearing a white sweater, and armed with a firearm. *Lopez*, 482 F.3d at 1069. Officers apprehended Lopez after observing him with the driver of the getaway car. *Lopez*, 482 F.3d at 1070. The Ninth Circuit concluded that the police lacked probable cause to believe that Lopez was the attempted shooter. *Lopez*, 482 F.3d at 1073. While Lopez was a young Hispanic male, he lacked the specific descriptors associated with the attempted shooter: he was only 5'6‘, he was not wearing a sweater, he was unarmed, and he wore glasses. Id.

Here too the police relied on the caller’s description of Tomas as Hispanic, the fact that he was in the area described by the caller, and appeared odd. RP 10. The police had a description of the man as Hispanic, wearing blue jeans with his hat backwards, in the middle of the street, alone, while waiving a knife in the air. RP 10-11.

The police however never described Tomas as Hispanic or wearing a hat backwards with blue jeans, and Tomas was not located in the middle of a street, and was not waiving a knife. Rather the police found Tomas in a house and described him as shaking, sweating and acting odd. RP 12-13. This description

lacked specific descriptors, such as the hat worn backwards or the sweatshirt.

Under *Lopez*, even if the state had produced evidence that Tomas was Hispanic and matching the description provided by the caller, which they did not, this would have been insufficient to identify Tomas as having been involved in criminal activity because the caller did not describe criminal activity and when Tomas exited the house he was also not committing a crime. Here as in Lopez, the police, by implication, believed that Tomas was Hispanic and illegally detained him without reasonable articulable suspicion of criminal activity. *Lopez*, 482 F.3d at 1073.

In *Gatewood,* the police saw Gatewood's eyes widen upon seeing the patrol car, Gatewood, moved to the left as if to hide something, and he left the bus shelter to cross-the street, but did not run. *Gatewood,* 163 Wn.2d at 540. The Court held that this was insufficient to justify a *Terry* stop because the Gatewood did not run away, the police could not see what Gatewood tried to hide, and looking alarmed at the police presence did not constitute reasonable articulable suspicion of criminal activity. Id. Additionally, nervousness is not sufficient for *Terry* stop. *State v. Henry*, 80 Wn.

App. 544, 552, 910 P.2d 1290 (1995). Moreover, as a general proposition, there is no obligation to cooperate with the police. *E.g., State v. Budik,* 172 Wn.2d 727, 272 P.3d 816 (2012) ((defendant falsely telling police that he was unaware of identity of man who shot him not a crime).

Here, when the police arrived, no one was waiving a knife in the street. RP 11. The police believed that the caller indicated that the man went into a red, brick-style house. Id. The police knocked and entered the house that met this description. A few moments later, Tomas came out of the house, sweating, shaking, and acting odd. RP 12.

Under the totality of the circumstances, this behavior like that in *Gatewood* where the defendant's eyes opened wide and he avoided the police, was not criminal and did not give rise to a reasonable, articulable suspicion of criminal activity. *Gatewood,* 163 Wn.2d at 540.

Even though Tomas was charged with assaulting an officer, his behavior was more akin to resisting an unlawful arrest *State v. D.E.D.,* ___P.3d___ (2017). In *D.E.D.*, this Court reversed a conviction for obstructing an officer based on the defendant's

;awful right to struggle against being handcuffed when D.E.D. had not yet been arrested. Here too, Tomas resisted being handcuffed prior to his being arrested. Tomas' behavior described and charged as an assault was in fact only the act of resisting because as argued, supra, the state did not prove that Tomas assaulted an officer.

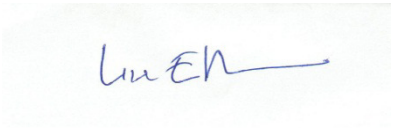
Because police unlawfully detained Tomas without reasonable articulable suspicion of criminal activity, and Tomas lawfully resisted the illegal detention, this Court should reverse the conviction and remand for dismissal with prejudice because Tomas was illegally seized.

D. CONCLUSION

Pedro Tomas respectfully requests this Court reverse his conviction for assault in the third degree and remand for dismissal with prejudice based on insufficient evidence to prove the elements of the crime beyond a reasonable doubt, and or based on an unlawful detention and arrest.

DATED this 4th day of October 2017.

Respectfully submitted,



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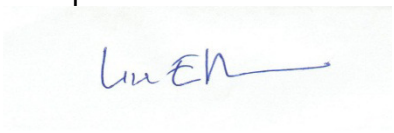

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